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In re application of :
Fein : DECISION DISMISSING
Application No. 08/917,044 : PETITION
Filing date: August 19, 1997 :
Attorney Docket No. C37-129A :

This is a decision on the petition under 37 CFR 1.137(a), filed February 15, 2000 to revive the above-identified application.

The petition is **Dismissed**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a), or as noted below, under § 1.137(b)."

The provisions of 37 CFR 1.137(a) provide that where the delay in reply was unavoidable, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(a). A grantable petition pursuant to 37 CFR 1.137(a) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(l);

(3) a showing to the satisfaction of the Commissioner that the **entire** delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and

(4) any terminal disclaimer (and fee set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

This petition lacks item (3) above.

This application became abandoned for failure to timely pay the issue fee on or before January 7, 2000 in reply to the Notice of Allowance of October, 7, 1999, which set a statutory period for reply of three (3) months. On the same date, the Notice of Allowability set a shortened statutory period for reply of three months within which to supply formal drawings. As the issue fee and drawings were not timely supplied, this application became abandoned at midnight on January 7, 2000. A Notice of Abandonment has not been mailed.

Petitioner asserts that the delay was unavoidable, due to a docketing error which led counsel to believe the reply had been timely filed. Specifically, while the reply had been timely docketed in both counsel's personal calendar, and the firm's calendar, and while the drawings had been ordered, and the issue fee payment and transmittal had been prepared, and the papers brought to counsel for signature the file and papers were moved and thereafter inadvertently overlooked.

The record lacks an adequate explanation of how both counsel's personal, and the firm's, docketing systems, worked. That is, how does each system indicate that a docketed reply had or had not been mailed? From inspection of Exhibits A and B (which are reversed from the narrative explanation), and the entries thereon for December 7, 1999, and January 7, 2000, it appears that the reply has not been "crossed off" on the calendar sheets, or otherwise indicate that the reply had in fact been submitted. A reasonable and prudent person with respect to his most important business would diligently monitor his docketing system and ensure that it indicated whether *vel non* a reply remained outstanding and had not been submitted. What is the basis for the belief, as reflected in the documented docket records, for both counsel and his assistant, that the reply for this case had been

submitted? Why was the system not reviewed until January 14, 2000? How often is it reviewed? Why did the system indicate on January 14, 2000 that the reply had not been submitted, as compared to, say, December 14, 1999?

ALTERNATE VENUE

Petitioner may wish to consider filing a petition under amended 37 CFR 1.137 (b). Section 1.137(b) now provides that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Assistant Commissioner for Patents
Box DAC
Washington, D.C. 20231

By facsimile: (703) 308-6916
Attn: Office of Petitions

By hand: Crystal Plaza 4, Suite 3C23
2201 South Clark Place
Arlington, VA.

Telephone inquiries concerning this matter may be directed to the undersigned at (703) 305-1820.



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